IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 78-1539

KEAUKAHA-PANAEWA COMMUNITY ASSOCIATION, KEAUKAHA-PANAEWA FARMERS ASSOCIATION, ISABEL LEINANI KNUTSON, ERMA KALANUI and APRIL KAMAKAOKALANIMALUNAO'E KALANUI, by her guardian ad litem, ERMA KALANUI, individually and on behalf of all persons similarly situated,

Plaintiffs-Appellees,

vs.

HAWAIIAN HOMES COMMISSION, BILLIE BEAMER, in her capacity as Chairman of the Hawaiian Homes Commission, THE DEPARTMENT OF HAWAIIAN HOME LANDS,

Defendants-Appellants,

and

COUNTY OF HAWAII, EDWARD HARADA, in his capacity as Chief Engineer, County of Hawaii,

Defendants,

and

JAMES W. GLOVER, LTD., A Hawaii Corporation,

Defendant.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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I. INTRODUCTION

Plaintiffs-Appellees ("Petitioners") submitted to this court a petition for a writ of certiorari from the adverse decision in the above-entitled case of the United States Court of Appeals, Ninth Circuit, dated September 18, 1978 (Petitioners' Appendix D), as amended on denial of rehearing and rehearing en banc on January 9, 1979. The petition does not contain a copy of the circuit court's order of January 9, 1979. Petitioners claim to be native Hawaiians and intended beneficiaries of Hawaiian home lands. They commenced the action in the

United States District Court for the District of Hawaii to enjoin further construction of the Waiakea-Uka Flood Control Project which will allegedly destroy certain portion of such Hawaiian home lands, otherwise known as "available lands" as defined in the Hawaiian Homes Commission Act (HHCA), 1920, as amended. Petitioners claim that the flood control project violates their rights under Section 4 of the Admission Act of 1959, the Hawaiian Homes Commission Act of 1920, and Article XI of the Hawaii State Constitution. Defendants-Appellants ("Respondents") moved to dismiss the action on jurisdictional grounds but the District Court denied the motion (Petitioners' Appendix A). On Petitioners' motion for partial summary judgment, the District Court, stating its findings of fact and conclusions of law, rendered judgment granting the relief prayed for (Petitioners' Appendix B). In due time Respondents appealed to the circuit court. The Appellate Court requested the United States to submit a brief as amicus curiae on the jurisdictional aspects of the case (Petitioners' Appendix C) and the Respondents submitted a reply brief thereto (Respondents' Appendix I herein) which reply brief is hereby adopted as part of or supplement to this brief.

The Hawaiian Homes Commission Act, 1920, as amended, designated and reserved certain portion of public land in the then Territory now State of Hawaii for the use and benefit of native Hawaiians as defined in the Act. Pursuant to the provisions of Section 204(4), HHCA, Respondents, together with officials of the State Department of Land and Natural Resources initiated a land exchange to provide a replacement for the area to be used for the construction of the Waiakea-Uka Flood Control Project which is needed for the inhabitants of the place including native Hawaiians. The land exchange has not as yet been accomplished. Decisive effort, however, is being continuously and vigorously pursued to effect an exchange.

In our reply brief to the United States amicus curiae (Respondents' Appendix I) we pointed out that the HHCA has become and is now a state law and that the United States could

file a suit in federal court for a breach of any of the trust duties specified in Section 5(f) of the Hawaii Admission Act, Public Law 86-3, 73 Stat 4, (hereafter "Admission Act"), but that we don't agree that native Hawaiians can directly bring an action in federal court to enforce the trust provisions of Section 5(f) of the Admission Act. The District Court, while it traced out the rights of the Petitioners to have come from a federal law, sought to enforce in its decision the provisions of a state law, Section 204(4), HHCA. (See Dispositive portion of Petitioner's Appendix B)

Section 204(4) of HHCA, now a part of the Hawaii State Constitution, provides a power of review for the State Governor and the Secretary of Interior of the actions of defendants Hawaiian Homes Commission and Department of Hawaiian Home Lands regarding any questions of exchange of Hawaiian home lands. Fundamentally, this provision necessarily implies an exhaustion of this power of review before any such questions be brought to the proper court. Similarly, Section 207(c)(1)(A), HHCA, as amended, provides in part that "The Department is also authorized to grant licenses for lots within a district in which lands are leased under the provisions of this section, . . . (A) churches, hospitals, public schools, post offices, and other improvements for public purposes." This provision is the basis of Respondents' grant of license to Defendant county of Hawaii to use the land for the construction of the flood control project, a public easement and a public improvement. The law does not specify that the easement or public improvement must exclusively or primarily serve the native Hawaiians. Any violations of the above cited provisions as parts of Hawaii laws are subject to the action or review by the Governor under his constitutional responsibility in the faithful execution of State laws and his supervisory powers over executive departments (Sections 5 and 6, Art. IV, State Const.). The District Court observed the possibility and propriety of administrative review by the State Governor and the Secretary of Interior (see p. 13a of Petitioners' Appendix B) who are, as the court said, "declared by law to have independent power of review" on alleged improper use or disposition

of Hawaiian home lands. This is a ground to decline court jurisdiction since the relief prayed for by the Petitioners may be obtained from the aforesaid administrative officials who, if given the chance, are presumed to decide correctly, *Abelleira v. Court of Appeals,* 109 P2d 942, 949 (1941); *Tennessee Enamel Manufacturing Co. v. Hake,* 194 SW2d 468, 183 Tenn. 615 (1946).

In substance the controversy does not genuinely reach or touch any questions of federal interest as the Petitioners try to impress and induce this court to believe. It is simply an attempt to enforce a state law upon an alleged violation thereof, *Southern Power Co. v. North Carolina Public Service Co.,* 263 US 508 (1924). The purpose of Petitioners' complaint is "to enjoin further construction of the Waiakea-Uka Flood Control Project which is claimed to destroy more than twenty acres of available Panaewa agricultural land, because the diversion of this land to the county of Hawaii for a flood control project violates their rights under Section 4 of the Admission Act, the Hawaiian Homes Commission Act of 1920, and Article XI of the Hawaii State Constitution." This is the same objective relied upon by the District Court when it issued its order of denial (Petitioners' Appendix A) of Respondents' motions to dismiss. The involvement of purely state laws is further demonstrated by the judgment granting the relief prayed for when the court found a violation of Section 207(c)(1) of the Hawaiian Homes Commission Act and it ordered Respondents to "complete a land exchange as soon as reasonably possible in compliance with Section 204(4)" of the HHCA.

The Constitution of Hawaii is undoubtedly a State law. The provisions of Hawaiian Homes Commission Act, 1920, as amended, are now parts of the State Constitution by virtue of Section 4, Admission Act and Section 4 of the Admission Act itself is now part of Article XI of the Hawaii Constitution pursuant to Section 7(b) and (c), Public Law 86-3. In accordance with Section 5(h) of the Admission Act, the HHCA ceased to be effective as a federal law upon admission of Hawaii into the Union. The HHCA is now a state law of Hawaii and it was already removed as part of the United States

Code; see also U.S. Amicus brief, Petitioners' Appendix C.

II. QUESTION PRESENTED.

"Do native Hawaiian beneficiaries of the Hawaiian Homes Commission Act, adopted by Congress for their especial benefit, have the right to obtain judicial review in federal court of violations of the Act and breaches of trust provisions imposed on the Hawaiian Homes program by Congress in the Hawaii Admission Act."

III. REASONS FOR DISALLOWANCE OF THE WRIT

A. Petitioners have no standing or private cause of action against Respondents.

B. The Court of Appeals' decision is not in conflict with any decisions of this court.

IV. ARGUMENTS

A. Petitioners have no standing or private cause of action against Respondents.

Respondents recognize and admit the imposition upon the State government of Hawaii certain trust obligations created by the provisions of HHCA and the Hawaii Admission Act over certain public lands including Hawaiian home lands known as "available lands" for the use and benefit of native Hawaiians while the legal title to said lands belongs to the State as grantee from the United States. The Respondents in behalf of the State are particularly charged, under the supervision of the State Governor, with the duties in the proper administration and disposition of Hawaiian home lands for its intended beneficiaries. The Admission Act prescribed certain conditions for Hawaii's admission into the Union and, among others, the conditions required the adoption of the provisions of HHCA as part of the State Constitution and the acceptance by the people of Hawaii of all the provisions of the Admission Act prescribing the terms or conditions of the grants of lands or other property therein made to the State of Hawaii. The provisions of HHCA relating to the management and disposition of the Hawaiian home lands was made a compact between the United States and Hawaii (Section 4, Admission

Act). The United States granted and vested title to all public lands, including "available lands" as defined in Section 203, HHCA, to the State of Hawaii (Section 5 (b), Admission Act) and such lands, proceeds, and income shall be managed and disposed of for any of the purposes prescribed by the United States in the manner as the Constitution and laws of the State may provide and their use for any other object shall constitute a breach of trust for which suit may be brought by the United States, the grantor (Section 5(f)). Essentially the compact is a contract between the two sovereign and no third party is involved in the agreement. For any violation of the conditions of the agreement or grant of the public lands to the State, only the United States as grantor and former owner of such public lands, can demand the performance of the conditions thereof. *Ervien v. United States*, 251 U.S. 41, 48 (1919). The United States alone has the power to enforce the conditions of the grant by means of suitable action in a clear case of violations thereof, *Emigrant Co. v. County of Adams*, 100 U.S. 61 (1879), as the matter is between the grantor and the grantee, *United States v. Louisiana*, 127 U.S. 182, 189 (1888). It is for the United States to complain of any breach if there is any, and since Plaintiffs are not parties to the contract, they have no standing to invoke its provisions, *Hagar v. Reclamation District No. 108*, 111 U.S. 701 (1883).

It is true, Hawaiian home lands or "available lands" are entrusted to the State for certain specific use and purpose for the benefit of native Hawaiians, a class or group of persons which Petitioners claim to belong, but title to and ownership of the land in dispute remain in the State and it has not been disposed of or granted to the Petitioners for any specific use or purpose in accordance with the grantor's condition. The State owes its trust duties to the United States. Unless the trust lands are disposed of to the Petitioners for any of the purposes of the grant in *such manner as the constitution and laws of the State* may provide, no privity is established under which Petitioners may predicate an action. As intended beneficiaries of Hawaiian home lands, Petitioners have no right to enforce the trust; only the grantor can inquire into the manner of its execution,

Kings County, Washington v. Seattle School District No. 1, 263 U.S. 361 (1923).

The Admission Act did not create a private cause of action whereby Petitioners may enforce the trust duties and obligations imposed by the Admission Act. In the absence of statutory authority, express or implied, the Petitioners cannot enforce the trust against the State. (For more illustrative discussions please see Respondents' Appendix I). Neither the State Constitution which now embodies the provisions of the HHCA nor any other Hawaii statute contains a provision expressly or impliedly granting the institution of Petitioners' suit with the federal court. Examination of the provisions of the Admission Act, the State Constitution, the Hawaiian Homes Commission Act as amended (now read as part of the Constitution) including legislative proceedings behind them do not indicate any intent to grant a private remedy; rather, it is more apparent that legislative intent is to deny private cause of action. This is demonstrated by the express provision of Section 5(f) itself granting a cause of action to the United States for any violation of the conditions of the grant of such public lands held in trust by the State. If it were Congress' intent to create a private remedy it could have so provided conveniently since a cause of action or remedy at least for purposes of jurisdiction is not ordinarily assumed. This observation has also been noted by the Court of Appeals (9th Circuit) in its analysis and application of the criteria that determine an implied private cause of action, set forth by this Court in *Cort v. Ash*, 422 U.S. 66, 43 LEd2d 4773 (1975). The four factors which must all be present to satisfy implication of a private cause of action are:

(1) Is the statute a federal law enacted for the benefit of a class of which plaintiff is a member?

(2) Is there indication of legislative intent to create a private remedy?

(3) Is the implication of such a remedy consistent with the underlying purposes of the legislative scheme?

(4) Is implying a federal remedy inappropriate because

the subject matter involves an area basically of concern to the State?

The Circuit Court had found lacking one or more of the four factors in the case at bar. These four factors are the prevailing tests that determine the existence of an implied private cause of action. This court has found a complete application of the *Cort* tests in its recent decision in *Cannon v. University of Chicago*, No. 77-926, 47 LW 4549, May 14, 1979, which is, however, distinguished from the present case. In *Cannon* where a woman medical school applicant was denied admission by the University of Chicago to participate in Education programs supported by federal funds the court considered an implied private right of action by the Plaintiff in the interpretation of the provisions of the Education Amendments to the 1964 Civil Rights Acts prohibiting sex discrimination in education programs receiving federal assistance. The court declared the legislative history of Title IX of the Act, prohibiting sex discrimination, plainly indicates that Congress intended to create a private cause of action, and that Title IX was patterned after Title VI of the Civil Rights Act of 1964, and the drafters of Title IX explicitly assumed that it would be interpreted and enforced in the same manner as Title VI, which has already been construed as creating a private remedy when Title IX was enacted. The situation in *Cannon* is, however, different from the present case.

Applying the first test, the Civil Rights Act invoked in *Cannon* is a federal law applicable to all states and citizens of the United States. In the instant case the direct source of Plaintiffs' rights to Hawaiian home lands is the State Constitution which now embodies the Hawaiian Homes Commission Act since Hawaii became part of the Union in 1959. Administration of the HHCA has become purely a state affair. One does not go back to any federal law to consider and grant any specific use and purpose of Hawaiian home lands. Petitioners seem to rely on the provisions of Section 5(f) of the Admission Act but its trust provisions pertain to all public lands of the State of Hawaii and benefit all Hawaii citizens alike without special treatment to native Hawaiians. The remedy provided

to the United States is a public cause of action. Section 5(f) does not include a private cause of action and to imply such right would amount to a suit against the State without its consent, *Naganab v. Hitchcock*, 202 U.S. 473 (1906); *Oregon v. Hitchcock*, 202 U.S. 60 (1906); see also *In Re: Ayers*, 123 U.S. 443 (1887); *Morrison v. Work* 474 U.S. 481 (1925). Hawaiian home lands are community lands for native Hawaiians, and unless a fee or specific vested right is granted to a particular part of the land, title is vested in the State, and an individual or group of native Hawaiians cannot sue the State (see *Affiliated Ute Citizens of the State of Utah v. U.S.*, 431 F2d 349 (1970), 10th Circuit; *Omaha Indian Tribe v. Wilson*, State of Iowa, 575 F2d 622 (1978); *Cooper v. Roberts*, (18 How 173), 59 U.S. 173 (1855). Besides, as stated above, the Admission Act is a compact between the United States and Hawaii; it is a contract between two sovereign and the Plaintiffs are not parties to it. The United States was the grantor of the public lands to the State with certain conditions subsequent to be performed under the agreement. It has been held that no one can take advantage of the nonperformance of a condition subsequent annexed to an estate in fee except the grantor. The same rule applies to a grant upon conditions subsequent proceeding from the government (*Alabama v. Schmidt*, 232 U.S. 168 (1914); see also *Schulenburg v. Harriman*, 21 Wall 44 (1874); *Spokane & Co. v. Washington R. Co.*, 219 U.S. 166 (1911); *U.S. v. Northern Pacific Railway Co.*, 152 U.S. 284 (1894). It is hard to imagine every dissatisfied native Hawaiian citizen suing the state and its officers against all sovereign functions in the administration and disposition of public lands, including Hawaiian home lands, in the state.

As to the second test prescribed by *Cort*, it is quite apparent that there was no indication of legislative intent to create a private remedy under Section 5(f) of the Admission Act. This seems clear from Congressional records and deliberations behind the enactment of the Admission Act and even HHCA and the Constitution of Hawaii.

The third test in *Cort* requires that an implied private remedy must be compatible with the general scheme and

purpose of the law granting the basic right. In the case at bar, it is rather the clear intention of the Admission Act to place complete ownership and responsibility over Hawaiian home lands programs to the State by making HHCA part of the Constitution and that Section 5(f) of the Admission Act provides that the disposition and management of the public land trust which include the Hawaiian home lands shall be *in such manner as the Constitution and laws of said State may provide.*

The last *Cort* element asks whether or not implying a federal remedy is inappropriate because the subject matter involves an area basically of concern to the State. The Hawaiian home lands program, as pointed out above, has been relegated to state law and is a purely state affair since the admission of Hawaii into the Union about twenty years ago when the United States transferred its control and interest in Hawaiian home lands. Management and disposition of such lands are now matters of state laws and concern. Petitioners' complaint is actually based on the Constitution (provisions of HHCA) which they now seek to enforce (see Plaintiffs' complaint). Finally, the prosecution of the Hawaiian Homes program is carried on and supported purely by State funds and no federal interest or fund is involved. It is therefore most appropriate that Petitioners' problem be treated under Hawaii laws and judicial system as found by the Court of Appeals.

B. The Court of Appeals' decision is not in conflict with any decisions of this Court.

Petitioners try to emphasize the application in this case of certain American Indian cases on lands held in trust by the United States. Notably among the important ones are, *Oneida Indian Nation v. County of Oneida,* 414 U.S. 661 (1974) and *Poafpybitty v. Skelly Oil Co.,* 390 U.S. 365 (1968). In *Oneida,* the land is a tribal land belonging to the Oneida Indian tribes and recognized by a treaty and federal statute. The right to possession of this land is claimed to arise under a federal law *in the first instance.* The aboriginal title of Indian tribe as an independent governing body has never been extinguished. Indeed this court has stated in the *Oneida case,* at 684, under the

concurring opinions of Justices Rehnquist and Powell that "the opinion of the Court today should give no comfort to persons with garden-variety ejectment claims who for one reason or another, are covetously eying the door to the federal courthouse. The general standards for determining federal jurisdiction, and in particular the standards for evaluating compliance with the well-pleaded complaint rule, will retain their traditional vigor tomorrow as today."

In *Poafpybitty,* the Indians are expressly authorized to institute proceedings against the United States to establish their right to an allotment (see 25 U.S.C. § 345). The parties to the case are lessor and lessee and the Indians are granted right of action against the United States to enforce their right for allotment.

In another case, *Moe v. Confederated Salish and Kootenai Tribes,* 425 U.S. 463 (1976), the right to bring action by the Indian tribe is derived from the legislative history of 28 U.S.C. § 1362 which grants standing to the tribe which has a self-governing body recognized by the Secretary of Interior. The case at bar is not really parallel or similar to any of the above-cited cases relied upon by the Petitioners. These cases have their own peculiar circumstances as distinguished from the present case.

Examination of this court's holdings in the above-cited cases relied upon by the Petitioners shows that the requisites in *Cort v. Ash, supra,* were satisfied. Private rights of action were either expressly provided or clearly implied by Congress. History of enabling acts admitting the different states into the Union do not generally grant private cause of action to enforce public land trust obligations of the states, *Murphy, et al. v. State,* 181 P2d 344 (1947). Neither the Admission Act of Alaska (July 7, 1958, Public Law 85-508, 72 Stat. 339), which was followed by Hawaii (Public Law 86-3, 73 Stat. 4), provides any such right of action on trust lands against that state. The more restricted land grants started from the admission of New Mexico and Arizona in 1910 but no such right was ever granted. Over all, we find no general law applicable to all American Indians or native Americans as granting private

cause of action in the enforcement of rights on trust lands held by the states. The rights are rather found, if at all, in special statutes particular to specific groups of Indians or native Americans where Congress intended expressly or impliedly to grant the right. To treat the native Hawaiians differently by granting them a private right of action in a general law or in the Admissions Act, assuming that they are also Indians or native Americans, would be contrary to legal principles developed by this court.

V. CONCLUSION

This court should deny a writ of certiorari because Petitioners have no cause of action. Petitioners' action is in effect a suit against the State without its consent. There is really no federal interest or question involved as Plaintiffs' complaint is based on state laws. The decision of the court of appeals in above-entitled case is in harmony with the decisions and rulings enunciated by this court in the cases disposed of by it and those acted upon by the other appellate court.

Respectfully submitted,

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Appendix I

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

KEAUKAHA-PANAEWA COMMUNITY ASSOCIATION, et al.,	) CIVIL NO. 77-1044
Plaintiffs-Appellees,	)
vs.	)
HAWAIIAN HOMES COMMISSION, et al.,	)
Defendants-Appellants.	)

ON APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

REPLY BRIEF OF APPELLANTS TO BRIEF OF THE UNITED STATES, AMICUS CURIAE

I. INTRODUCTION

Appellants concur in the following views of the United States:

1. The Hawaiian Homes Commission Act, 1920, as amended (hereinafter referred to as "HHCA"), is a law of the State of Hawaii and is no longer a federal law;

2. The fact that the HHCA was required to be "adopted as a law of the state", as a compact with the United States, does not operate to make the HHCA a federal law; and

3. The United States could have properly maintained a suit in federal district court for a breach of any of the trust duties specified in Section 5(f) of the Hawaii Admission Act, 73 Stat. 4.

Appellants, however, do not agree that native Hawaiians can properly bring suit in federal court to enforce the trust provisions of Section 5(f) of the Hawaii Admission Act.

By the Admission Act of March 18, 1959, 73 Stat. 4, hereafter "Admission Act", Congress granted to the State of Hawaii, effective upon its admission into the Union, title to certain of its public lands, title to which was held by the United States immediately prior to Hawaii's admission as a State. Section 5(b) of the Admission Act provides as follows:

> (b) Except as provided in subsection (c) and (d) of this section, the United States grants to the State of Hawaii, effective upon its admission into the Union, the United States' title to all the public lands and other public property, and to all lands defined as "available lands" by section 203 of the Hawaiian Homes Commission Act, 1920, as amended, within the boundaries of the State of Hawaii, title to which is held by the United States immediately prior to its admission into the Union. The grant hereby made shall be in lieu of any and all grants provided for new States by provisions of law other than this Act, and such grants shall not extend to the State of Hawaii.

Congress imposed certain trust conditions upon the lands granted to the State. Section 5(f) of the Admission Act, provides in pertinent part as follows:

> (f) The lands granted to the State of Hawaii by subsection (b) of this section and public lands retained by the United States under subsections (c) and (d) and later conveyed to the State under subsection (e), together with the proceeds from the sale or other disposition of any such lands and the income therefrom, shall be held by said State as a public trust for the support of the public schools and

> other public educational institutions, for the betterment of the conditions of native Hawaiians, as defined in the Hawaiian Homes Commission Act, 1920, as amended, for the development of farm and home ownership on as widespread a basis as possible, for the making of public improvements, and for the provision of lands for public use . . . The schools and other educational institutions supported in whole or in part out of such public trust shall forever remain under the exclusive control of said State; and no part of the proceeds or income from the lands granted under this Act shall be used for the support of any sectarian or denominational school, college, or university.

Congress, by way of Section 7(b) of the Admission Act, required that the people of Hawaii vote on three questions, each requiring an affirmative majority vote if Hawaii were to be admitted to the Union:

(1) Shall Hawaii be admitted?
(2) Are the state boundaries set by the act approved?
(3) Are the provisions of the act with respect to the disposition of public lands in Hawaii approved?

The three-fold proposition was submitted to the Hawaii electorate at the primary election of June 27, 1959. The ballots of the voters were in the affirmative. The State of Hawaii accepted the grant of the lands upon the conditions and limitations imposed. (See 1 Attorney General's Office and Public Archives, *Proceedings of the Constitutional Convention of Hawaii*, 1950 (Preface, p. v.)).

In *State of Hawaii v. Zimring*, 58 Haw. 106, 566 P. 2d 725 (1977), the State Supreme Court had occasion to consider the question of the public lands conveyed by Congress to the State of Hawaii upon its admission into the Union. It stated, at p. 125:

> The beneficial ownership of the people of Hawaii was again acknowledged in the Admission Act, wherein Congress provided that the public lands conveyed to the State upon admission "shall be held by said State as a *public trust* for the support of the public schools and other public [educational] institutions, for the betterment of conditions

of native Hawaiians . . . for the development of farm and home ownership on as widespread a basis as possible, for the making of public improvements, and for the provisions of lands for public use."

Excepting lands set aside for federal purposes, the equitable ownership of the subject parcel and other public land in Hawaii has always been in its people. *Upon admission, trusteeship to such lands was transferred to the State, and the subject land has remained in public trust since that time.*

Thus, it appears clear and settled that the lands conveyed to the State of Hawaii upon its admission into the Union by Congress are imposed with conditions of public trust for the purposes enumerated in the Admission Act. The lands granted to the State and the proceeds from the sale or other disposition of said lands and income therefrom are held in trust for five enumerated purposes:

1. for the support of the public schools and other public educational institutions;
2. for the betterment of conditions of native Hawaiians, as defined in the Hawaiian Homes Commission Act, 1920, as amended;
3. for the development of farm and home ownership on as widespread a basis as possible;
4. for the making of public improvements; and
5. for the provisions of lands for public use.

For any breach of trust, the United States is authorized to bring suit. Section 5(f) of the Admission Act provides in pertinent part that:

> Such lands, proceeds, and income shall be managed and disposed of for one or more of the foregoing purposes in such manner as the constitution and laws of said State may provide, and their use for any other object shall constitute a breach of trust for which suit may be brought by the United States.

II. ARGUMENTS

A. The Admission Act forms a contract between the State of Hawaii and the Nation and Appellees *have no right to enforce the terms thereof.*

The lands in controversy form a part of the total public lands granted by Congress to the State as trustee. Congress granted these lands to the State in trust "with the understanding that, as trustee, it should use them in the best possible manner for accomplishing the trust purposes." *Stearns v. Minnesota,* 179 U.S. 223, 240 (1900). Congress, acting for the United States, the owner of the lands, "being the grantor of the lands, could impose conditions upon their use, and have the right to exact the performance of the conditions." *Ervien v. United States,* 251 U.S. 41, 48 (1919).

The right of Congress to impose such conditions in the admission of a State into the Union is not questioned for it has been stated in *Coyle v. Oklahoma,* 221 U.S. 559, 574 (1911), that:

> It may well happen that Congress should embrace in an enactment introducing a new State into the Union legislation intended as . . . regulations touching the sole care and disposition of the public lands or reservations therein which might be upheld as legislation within the sphere of the plain power of Congress. But in every such case such legislation would derive its force not from any agreement or compact with the proposed new State, nor by reason of its acceptance of such enactment as a term of admission, but solely because the power of Congress extended to the subject, and therefore, would not operate to restrict the State's legislative power in respect of any matter which was not plainly within the regulating power of Congress.

See also, Lassen v. Arizona Highway Department, 385 U.S. 458, n. 3, (1967), for a discussion as to total acreage of lands granted to the states for all purposes, and *Alamo Land and Cattle Co. v. Arizona,* 424 U.S. 295 (1976). Nor can it be doubted that the State of Hawaii had the power to accept the trust conditions imposed by Congress, for it is well recognized that "[T]he right of a state to accept such a trust cannot now be doubted. It has become a part of the judicial history of the country." *Stearns v. Minnesota, supra,* p. 240.

And, as has been stated earlier, where Congress granted lands in trust, "it has long since been settled that Congress alone can inquire into the manner in which the State executed that trust and disposed of the lands" *Stearns v. Minnesota, supra,* pp. 231-32; and that "Congress alone has the power to enforce the conditions of the grant, either by revocation thereof, or other suitable action in a clear case of violations of the conditions." *Emigrant Co. v. County of Adams,* 100 U.S. 61 (1879).

The State of Hawaii accepted the trust created by the Act of Congress. "Acceptance by the trustee of the obligations created by the donor of the trust completes a contract." *Stearns v. Minnesota, supra,* p. 249. Such a contract "is a matter between two sovereign powers" *United States v. Louisiana,* 127 U.S. 182, 189 (1888) and "when the State accepted its benefits, it is for the United States to complain of the breach if there by any. The Plaintiff is not a party to the contract, and is in no position to invoke its protection." *Hagar v. Reclamation District No. 108,* 111 U.S. 701, 712-13 (1883).

B. The United States, having imposed the trust by way of the Admission Act, only the United States can enforce its terms.

It has long been settled that where lands were granted by Congress to a state as trustee, Congress alone can inquire into the manner in which the state executed that trust and disposed of the lands. *Emigrant Co. v. Adams County, supra,* p. 69; *Stearns v. Minnesota, supra; Ervien v. United States, supra.*

A case somewhat analogous to the case under consideration is *King County, Washington v. Seattle School District No. 1,* 263 U.S. 361 (1923), wherein the Court held the beneficiary of the Act of Congress not to have standing. This was a suit brought by Seattle School District No. 1 seeking to have King County and its treasurer declared to be trustees and requiring them to account for certain moneys received and to pay the sum claimed.

The Act of Congress directed that 25 percent of all moneys received from each forest reserve during any fiscal year be

paid at the end thereof by the Secretary of the Treasury to the state in which the reserve was situated to be expended as the state legislature may prescribe for the benefit of the public schools and public roads of the county or counties in which the forest reserve was situated.

The Secretary of the Treasury paid over to the State the proper amounts for the years from 1908 to 1918, inclusive. A part of the Snoqualmie Forest Reserve was in King County, and the proportionate amounts for these years, aggregating $20,106.07, were turned over by the State to the County Treasurer. For the years 1908, 1916, 1917 and 1918, the County Commissioner directed that one-half of the amount be apportioned to the county school fund and one-half to the road and bridge fund; and for each of the years from 1909 to 1915, inclusive, directed that all be assigned to the road and bridge fund.

The appellee was one of the school districts of the county. The appellee had urged that the Act of Congress permitted the money received by the county to be expended by the county and required an equal distribution annually for the benefit of public schools and public roads of the county.

The Court did not agree with the contention of the appellee. The Court, at pp. 364-65, determined that:

> When turned over to the State, the money belongs to it absolutely. There is no limitation upon the power of the legislature to prescribe how the expenditures shall be made for the purposes stated, though, by the Act of Congress, "there is a sacred obligation imposed on its public faith." (Citations omitted.) No trust for the benefit of the appellee is created by the grant. But, *assuming the moneys paid over to the State are charged with a trust* that there shall be expended annually one-half for schools and one-half for roads, *the appellee has no right to enforce the trust. Congress alone can inquire into the manner of its execution by the State.* (Emphasis added.)

The Court held, at p. 365, the Appellee had "no standing" to object to the distributions made by the county commissioners.

C. The Admission Act creates no cause of action whereby Appellees may enforce the duties and obligations imposed by the Admission Act.

In the case of *National Railroad Passenger Corp. v. National Association of Railroad Passengers*, 414 U.S. 453 (1974), the Supreme Court had occasion to determine the enforceability of the Rail Passenger Service Act of 1970 (Amtrak Act). Three issues were presented: 1) federal court jurisdiction under the terms of the Act to entertain such a suit; 2) whether the Act can be read to create a private right of action to enforce compliance with its provisions; and 3) whether the respondent had standing to bring such a suit. However, the Court stated, at p. 456, that:

> [T]he threshold question clearly is whether the Amtrak Act or any other provision of law creates a cause of action whereby a private party such as the respondent can enforce duties and obligations imposed by the Act; for it is only if such a right of actions exists that we need consider whether the respondent had standing to bring the action and whether the District Court had jurisdiction to entertain it.

The National Association of Railroad Passengers (NARP) brought this action in the district court to enjoin the announced discontinuance of certain passenger trains that had previously been operated by the Central of Georgia Railway Co. (Central). The defendants were Central, its parent, Southern Railway Co. (Southern), and the National Railroad Passenger Corp. (Amtrak).

After the enactment of the Rail Passenger Service Act of 1970 (Amtrak Act), Central contracted with Amtrak for the latter to assume Central's intercity rail passenger service responsibilities. Southern had not entered into any contract with Amtrak. The train discontinuances that precipitated the action were announced by Amtrak pursuant to § 404(b)(2) of the Amtrak Act, 45 U.S.C. § 564(b)(2). The gravamen of NARP's complaint was that these discontinuances were not authorized, and in fact were prohibited, by the Amtrak Act.

The District Court concluded that NARP lacked standing

under § 307 of the Amtrak Act and dismissed the action. On appeal, the Court of Appeals for the District of Columbia Circuit reversed, holding that NARP had standing and that § 307 does not otherwise bar such a suit by a private party who is allegedly aggrieved.

On appeal to the Supreme Court, after a review of the Act, the Court found, at p. 456, that:

> The only section of the Act that authorizes any suits to enforce duties and obligations is § 307(a) which provides:
>
> "If the Corporation or any railroad engages in or adheres to any action, practice or policy inconsistent with the policies and purposes of this chapter, obstructs or interferes with any activities authorized by this chapter, refuses, fails, or neglects to discharge its duties and responsibilities under this chapter, or threatens any such violation, obstruction, interference, refusal, failure or neglect, the district court of the United States for any district in which the Corporation or other person resides or may be found shall have jurisdiction, except as otherwise prohibited by law, upon petition of the Attorney General of the United States or, in a case involving a labor agreement, upon petition of any employee affected thereby, including duly authorized employee representatives, to grant such equitable relief as may be necessary or appropriate to prevent or terminate any violation, conduct, or threat."

After analyzing the legislative history of the Act, the Court concluded, at p. 457, that:

> In light of the language and legislative history of § 307(a), we read it as creating a public cause of action, maintainable by the Attorney General, to enforce the duties and responsibilities imposed by the Act. The only private cause of action created by that provision, however, is explicitly limited to "a case involving a labor agreement." Thus, no authority for the action the respondent has brought can be found in the language of § 307(a). The argument is made, however, that § 307(a) serves only to authorize certain suits against Amtrak and that it should

not be read to preclude other private causes of action for the enforcement of obligations imposed by the Act.

The respondent claims that railroad passengers are the intended beneficiaries of the Act and that the courts should therefore imply a private cause of action whereby they can enforce compliance with the Act's provisions.

The Court, at p. 464, said:

> [W]e hold that § 307(a) provides the exclusive remedies for breaches of any duties or obligations imposed by the Amtrak Act, and that no additional private cause of action to enforce compliance with the Act's provisions can properly be inferred.

Recently, this court, in *City of Palo Alto v. City and County of San Francisco,* 548 F.2d 1374 (9th Cir. 1977), had occasion to consider the *National Railroad Passenger Corp.* case. This court found it unnecessary to decide whether the Raker Act created a private cause of action on behalf of appellees under the reasoning of the *National Railroad Passenger Corp.* Instead, this court decided that the Bay Cities were intended to be direct beneficiaries of the Raker Act and accordingly, had standing to assert a violation of that Act. The basis for this decision was cited as *Hardin v. Kentucky Utilities Co.,* 390 U.S. 1 (1974). The question for determination in *Hardin* was whether Congress had prohibited the Tennessee Valley Authority (TVA) from competing in the sale of electricity with Kentucky Utilities Company. Kentucky Utilities had filed this suit against TVA and others charging them with conspiracy to destroy its Tazewell business and asked the court to enjoin TVA from supplying power to the municipal system in alleged violation of § 15d of the Tennessee Valley Authority Act of 1933, as amended. It was contended by petitioners that the Kentucky Utilities Company lacked standing to challenge the legality of TVA's activities. To that argument, the Supreme Court stated, at pp. 5-7:

> This Court has, it is true, repeatedly held that the economic injury which results from lawful competition cannot, in and of itself, confer standing on the injured business to question the legality of any aspect of its com-

> petitor's operations. (Citations omitted.) But competitive injury provided no basis for standing in the above cases simply because the statutory and constitutional requirements that the plaintiff sought to enforce were in no way concerned with protecting against competitive injury. In contrast, it has been the rule, at least since the *Chicago Junction Case,* 264 U.S. 258 (1924), that when the particular statutory provision invoked does reflect legislative purpose to protect a competitive interest, the injured competitor has standing to require compliance with that provision. (Citations omitted.)
>
> Petitioners concede . . . that one of the primary purposes of the area limitations in § 15d of the Act was to protect private utilities from TVA competition. This is evident from the provision itself and is amply supported by its legislative history . . . [I]t is clear and undisputed that protection of private utilities from TVA competition was almost universally regarded as the primary objective of the limitation. Since respondent is thus in the class which § 15d is designed to protect, it has standing under familiar judicial principles to bring this suit (citations omitted), and no explicit statutory provision is necessary to confer standing.

Adopting the rationale in *Hardin,* this court, in justifying its determination, traced the legislative history of the Raker Act and found, at p. 1377, that:

> While the Bay Cities are not expressly denominated as co-grantees without the consent of San Francisco, the legislative debates indicate that this omission does not alter the co-grantee characterization of the Bay Cities. Indeed, the drafters of the Act concluded that it would be redundant to designate the Bay Cities as co-grantees because the assumption in drafting the Act was that both San Francisco and the Bay Cities would share in the benefits of the Act.

On appeal, the appellants had also urged the court's consideration of the provisions of Section 9(a) and 10 of the Raker Act. Section 9(a) provided that if the grantee did not abide by the conditions of the grant, the Secretary of Interior may ask the Attorney General to bring suit to enforce them. Section 10

gave certain irrigation districts the right to commence a suit to enforce the rights granted them under the Act. Despite the language of these provisions, this court concluded, at p. 1378:

> The Bay Cities played a leading role among the dramatis personae in the passage of the Raker Act. Their support for the bill, their financial backing of the Hetch Hetchy facility and their growing demand for water were crucial factors in the passage of the Act. The legislative history and the language of the Act unmistakably reveal that the Bay Cities were intended to be equal beneficiaries with San Francisco of the Hetch Hetchy Grant, and thus equally entitled to enforce the conditions to that grant.

While we do not agree with the Court's conclusion reached therein in light of the Supreme Court's decision in *National Railroad Passenger Corp.*, the case under consideration is clearly distinguishable. First, in light of the Admission Act, it would strain one's imagination to consider the appellees, as well as the State, to be "co-grantees" of the land held in trust. To so construct the grant would either entitle the other beneficiaries enumerated in the Admission Act to be "co-grantees", or make appellees co-grantees of all public lands granted to the State by the Admission Act. The clear language of the Act, as well as the legislative history, refutes such a conclusion. Second, the Admission Act expressly provides for a public cause of action only. To construe the Admission Act as providing for a private cause of action to appellees would wreak havoc upon not only well settled principles of law hereinbefore stated but create new rights in beneficiaries of land grants made by Congress to the various states since 1803. (*See, Lassen v. Arizona, supra,* p. 461 n.3). Finally, and perhaps, most important, it would seem that the primary purpose for the formulation of the Admission Act was not to benefit any particular people or group. Rather, its primary purpose would seem to be that of establishing the relationship between the national and state governments. Thus, it is inconceivable to believe that the appellees are within the "class" that the Admission Act is designed to protect.

D. Appellees, absent express statutory authority, cannot enforce the trust against the State.

The United States, in its amicus curiae brief, cites the case of *Poafpybitty v. Skelly Oil Co.*, 390 U.S. 365 (1968), as the basis for its contention that appellees are entitled to bring suit in the United States District Court to compel compliance with the trust provisions. This case is clearly inapplicable.

Poafpybitty presented the question of whether petitioners, who were all Comanche Indians, had standing to sue under an oil and gas lease approved by the Department of Interior for use on land held by Indians under trust patents issued by the United States. In the case, the Indians, as lessors, had executed an oil and gas lease to Skelly Oil Company, the lessee, on the form prescribed by the Department of Interior. The Commissioner of Indian Affairs had given his approval. Petitioners claimed Skelly Oil had permitted natural gas being produced from the wells to escape despite the fact that there was a pipeline less than a mile from the land. Petitioners claimed that Skelly Oil ignored their request that the gas be marketed and continued to allow the gas to be wasted in violation of the terms of the lease. The Oklahoma District Court dismissed the petition and the Supreme Court of Oklahoma affirmed on the ground that petitioners were precluded from suing by the provisions of the lease and by regulations promulgated by the Secretary of Interior to control oil and gas leases on restricted Indian land. In its discussion, the Court stated, at pp. 370-71:

> Later decisions followed the implications of *Heckman* and held that the right of the United States to initiate a suit to protect the allotment did not diminish the Indian's right to sue on his own behalf. In *Creek Nation v. United States*, 318 U.S. 629 (1943), this Court held that Indian tribes had the power to sue a railroad for the improper use of Indian land even though the tribes could not sue the United States for its failure to collect the sums allegedly due. The Court stated, "That the United States also had a right to sue did not necessarily preclude the tribes from bringing their own actions." (Citations omitted.) Nor does the existence

of the Government's power to sue affect the rights of the individual Indian. "A restricted Indian is not without the capacity to sue or to be sued with respect to his affairs, including his restricted property. . . . both the Act of April 12, 1926 and the decision . . . in Heckman v. United States . . . recognize capacity in a restricted Indian to sue or defend actions in his own behalf subject only to the right of the Government to intervene."

The Court, after reviewing the lease and the regulatory scheme, found that nothing in the lease or regulations required the Indians to seek administrative action from the Government instead of instituting legal proceedings on their own. The Court held, at p. 376, that "the Indian lessors have the capacity to maintain an action seeking damages for the alleged breach of the oil and gas lease."

Similar holdings can be found in *Capitan Grande Band of Mission Indians v. Helix Irrigation District*, 514 F.2d 465 (9th Cir. 1975) and *State of New Mexico v. Aamodt*, 537 F.2d 1102 (10th Cir. 1976).

In each of these cases, the matter concerned 1) the United States, trustee; 2) Indians, beneficiaries; and 3) third parties—Skelly Oil Co. *(Poafpybitty)*, State of New Mexico *(Aamodt)*, and Helix Irrigation District *(Capitan Grande Band of Mission Indians)*. None of the cases involved the Indian beneficiary bringing an action against the United States, the trustee. However, in the *Poafpybitty* case, the Court did address the issue we are concerned with in the case under consideration when it stated, at p. 370:

> In *Creek Nation v. United States*, 318 U.S. 629 (1943), this court held that Indian tribes had the power to sue a railroad for the improper use of Indian land even though *the tribes could not sue the United States* for its failure to collect the sums allegedly due. (Emphasis added.)

And, in footnote 8, *id.*, the Court noted, "Indians of course are now authorized to bring claims against the United States. See Indian Claims Commission Act, 60 Stat. 1049 (1946), 25 U.S.C. § 70-70W."

Perhaps this concept is best expressed in Restatement

(Second) of Trusts, Section 95 (1959), relating to the United States or a State holding property in trust, which provides that:

> The United States or a State has capacity to take and hold property in trust, but in the absence of a statute otherwise providing the trust is unenforceable against the United States or a State.

In Section a. of the Commentary to § 95, it is there expressed that "As against the United States or a State the only remedy of the beneficiary is by a special act of the legislature, unless a proceeding in a Court of Claims or other tribunal is provided by statute."

Nothing in the Admission Act nor any statute known to appellants authorizes the appellees to enforce the trust provisions of the Admission Act. This does not mean, however, that a native Hawaiian beneficiary, who, having received a lease issued to him under the provisions of the Hawaiian Homes Commission Act, 1920, as amended, is in any way prohibited from bringing an action against a third party in a proper circumstance. Once having obtained a proprietary interest in a tract of Hawaiian home lands, assuming compliance with the lease terms and conditions and the provisions of the Hawaiian Homes Commission Act, 1920, as amended, such a beneficiary would have capacity to sue or to be sued in a State court to enforce the provisions of the lease.

III. CONCLUSION

For the foregoing reasons, Appellants respectfully submits that the judgment of the Court below should be reversed with instructions to dismiss the action.

DATED: Honolulu, Hawaii, June 30, 1978.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Charles F. Fell, hereby certify that on this 18th day of June, 1979, three copies of the Brief in Opposition to Petition for Writ of Certiorari in the above-entitled case were mailed, airmail postage prepaid, to the following Counsel:

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I further certify that all parties required to be served have been served.

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